ORISSA HIGH COURT
CUTTACK

OJC NO. 4068 OF 20002

In the matter of application under Articles 226 and 227 of the Constitution of India.

State of Orissa and others ..... Petitioners

Versus

Manorama Lenka ..... Opposite Party

For Petitioners - Addl. Govt. Advocate

For Opp.Party - M/s B.K.Mall, P.C. Pattnaik, C.Das, R.K.Mohanty, K.C. Prusty and P.K.Khuntia.

PRESENT: -

THE HON'BLE MR. JUSTICE I.M.QUDDUSI
AND
THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 25.10.2005

I.M.QUDDUSI, J. The State of Orissa in Health and Family Welfare Department along with four other Officers of the State have filed this writ petition against the judgment and order dated 30th July, 2001 passed by the Orissa Administrative Tribunal, Bhubaneswar, in O.A. No.1119 of 1993 which was filed by the opposite party, namely, Smt. Manorama Lenka, for a declaration that she was continuing in Government service and was entitled to join duties with all service and financial benefits. The other prayer made by her was that if any order of termination or removal from service had been passed, the

same be quashed being illegal, unconstitutional, arbitrary and mala fide and against the principles of natural justice and she be reinstated in service with all consequential benefits.

3. The brief facts of the case are that the opposite party was appointed as Auxilliary Nurse and Mid-Wifery on 25.05.1973 by the Director of Health & Family Welfare and was posted at the Leprosy Control Unit, Khallikote within the district of Ganjam. She was transferred eight times during the period from1973 to August, 1980 to different places including some remote and inaccessible places of the districts of Ganjam, Puri and Cuttack. Lastly, she was transferred from Delang to Algum on 30th August, 1980. She joined at Algum on 8th September, 1980, but due to non-availability of accommodation she submitted a leave application on 20th September, 1980 to the Medical Officer and proceeded on leave. Thereafter, on 5th November, 1980 she submitted a representation to the Joint Director, Health Services requesting him to transfer her to some institution located in Puri town, as no one was there to look after her family. She, thereafter, applied for extension of leave from time to time. She also requested the Minister of Health and Family Welfare for her transfer in the year 1981, but no reply was received by her. Ultimately, in August, 1991, she met the Medical Officer, Algum and wanted to join there, but the Medical Officer refused to accept her joining saying that another person had already been posted in her place. Thereafter, she met the C.D.M.O., Puri and requested him to post her at some place where she could join her duty. But, the C.D.M.O. advised her to extend leave and wait for the decision of the Government on her representation. She went on submitting applications for extension of leave and also moved several representations up to the level of the State Government. She also sent a notice by registered post to the Director of Health Services, Orissa. When she did not receive any response from any quarter, she filed the above-mentioned O.A. before the Tribunal. The Tribunal disposed of the O.A. vide the impugned

judgment and order with the direction that if within three months of receipt of a copy of the order of the Tribunal, the applicant (opposite party herein) reports for duty before the C.D.M.O., Puri, her joining report shall be accepted and the period of unauthorized absence shall be regularized by sanctioning leave as due and admissible under the rules. Further, if any period is required to be sanctioned as extraordinary leave, for which she will not get any salary, the said period shall constitute a break in her service and shall not count towards qualifying service or for any other purpose like leave, increment, etc. But, if she does not turn up to report for duty, the competent authority shall be at liberty to take action under Rule 72(2) of the Orissa Service Code. Being aggrieved, the opposite parties before the Tribunal have filed the instant writ application.

4. Before proceeding further, it is necessary to peruse the provisions of Sub-rule (2) of Rule 72 of Orissa Service Code as well as Sub-rule (4) of Rule 13 of the Orissa Leave Rules, 1966 which are reproduced hereunder:-

> "**Sub-rule (2) of Rule 72 of Orissa Service Code-** *Where a Government servant does not resume duty after remaining on leave for a continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall, unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classifications, Control and Appeal) Rules, 1962."*

> "**Sub-rule (4) of Rule 13 of The Orissa Leave Rules-** *Where a Government servant who is not in permanent employment fails to resume duty on the expiry of the maximum period of extraordinary leave granted to him or where such Government servant who is granted a lesser amount of extraordinary leave than the maximum amount admissible, remains absent from duty for any period which together with the*

> *extraordinary leave granted exceeds the limit up to which he could have been granted such leave under these rules, he shall, unless the State Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in Orissa Civil Services (Classification, Control and Appeal) Rules, 1962."*

5. Perusal of the above quoted rules makes it is clear that where a Government servant remains absent from duty beyond a period of five years otherwise than on foreign service or on account of suspension, he shall, unless the Government in view of exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962.

6. Unauthorized absence from duty is a misconduct and, therefore, it is provided under the statute that the Government servants can be removed due to unauthorized absence for more than five years, but only after following the procedure laid down in the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962. In the instant matter, admittedly no order of removal from service was passed against the opposite party nor was any inquiry conducted against her, as provided in the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962.

7. Learned Additional Government Advocate has submitted that there was no necessity to proceed under the Orissa Civil Services (Classification, Control and Appeal) Rules and the petitioner was deemed to have been removed automatically.

8. The Government of Orissa have issued clarifications in respect of Sub-rule (2) of Rule 72 of the Orissa Service Code from time to time. The clarifications were issued on 11th August, 1977 and thereafter on 29th December, 1984. For the present purpose, the clarification dated 29th December, 1984 is to be considered which is also quoted hereunder: -

> *" The undersigned is directed to say that according to Rule 72(2) of the Orissa Service Code and Rule 13(4) of the Orissa Leave Rules, 1966, where a Government servant does not resume his duty after expiry of the maximum period of leave/E.O.L. admissible to him under the Rules, he shall, unless the State government in view of exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in Orissa Civil Services (Classification, Control and Appeal) Rules, 1962. Instances have however, come to the notice of Finance Department that the above provisions are not being followed in most of the cases and Government servants are allowed to join duty after remaining absent unauthorisedly for longer periods than those permissible under rules referred to above and thereafter, proposals are being sent to this Department to regularize such unauthorized absence. Such proposals amount to condonation of the unauthorized absence without taking recourse under the Orissa Civil Service (Classification, Control and Appeal) rules, 1962.*
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> *(2) With a view to prevent the recurrence of such incidents, it is requested that provisions contained in Rule 72(2) of the Orissa Service Code and Rule 13(4) of the Orissa Leave Rules, 1966 should meticulously be followed in cases of unauthorized absence exceeding the limit prescribed under these rules and disciplinary action under the relevant provisions of Orissa C.C.A. Rules, 1962 should be initiated in such cases at the appropriate stage."*

According to the above clarification, in case of unauthorized absence, the provisions contained in Sub-rule (2) of Rule 72 Orissa Service Code as well as Sub-rule (4) of Rule 13 of Orissa Leave Rules, 1966 are to be meticulously followed and disciplinary action under the relevant provisions of the Orissa C.C.A. Rules, 1962 is to be initiated at the appropriate stage. As such the contention of the learned Additional Government Advocate that there is automatic or deemed removal from service after absence of more than five years is not sustainable.

9. However, the direction of the Tribunal that the period of unauthorized absence shall be regularized by sanctioning leave as

due and admissible under the Rules is contrary to law, as in that case it would not be possible for the petitioners to hold an inquiry against the opposite party to determine whether in fact the absence was unauthorized or not and whether any action is liable to be taken against her for such unauthorized absence. Therefore, considering the facts and circumstances of the case, we are of the opinion that it should be left open to the petitioners to initiate inquiry under the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 against the opposite party for her alleged unauthorized absence from duty for more than five years, if they deem it proper to do so at this stage.

10. We are informed that the opposite party has been allowed to join her duties and she is discharging her duties in pursuance of the impugned order passed by the Tribunal.

13. In the result, the writ petition is allowed in part. The impugned judgment and order passed by the Tribunal is modified to the extent that the opposite party shall be allowed to join, but it will be open for the petitioners to initiate proceedings under the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 against her, in case they think it proper to do so at this stage. The direction of the Tribunal to allow the opposite party to join her duty has already been carried out. We make it clear that in case proceedings are initiated and the opposite party is found guilty, it is not necessary to remove her from service, but, in the facts and circumstances, a lesser punishment can also be awarded according to the delinquency. In case it is not proposed to initiate any proceeding at this stage against the opposite party, period of her absence shall be regularized by sanctioning leave, extraordinary leave, leave on half pay or leave without pay, as the case may be, as per rules. But if any inquiry is initiated and the opposite party is not found guilty, in that case also the period of her absence shall be regularized, as already directed. It goes without saying that the opposite party shall be entitled to get

salary from the date of her joining. The interim order dated 06.05.2002 is vacated and shall not create any hurdle in continuation of service of opposite party after her joining. No order as to costs.

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I.M.QUDDUSI,J.

PRADIP MOHANTY,J. I agree.

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PRADIP MOHANTY,J.

High Court of Orissa, Cuttack,
The 25th day of October, 2005/***Samal***